In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-638

LEWIS POE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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December, 1979

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Reference footnote 1 on page 1 of the "Memorandum For The United States In Opposition" (hereafter "Gov't Opp. Memo").

The Respondent (hereafter "Solicitor General") has incorrectly paraphrased the allegations (Pet. App. A3) of the Complaint. Petitioner Poe, while in active military service, was not simply "arrested" and "transported to" a psychiatric ward where he was "subjected to examinations" without his consent. Poe was *unlawfully* and *unconstitutionally* arrested (Pet. App. A3). Poe was *unlawfully* transported and was *unconstitutionally, involuntarily,* and *totally confined* in a psycho ward (Pet. App. A3). Poe was never in need of psychiatric examination or care. The defendant unlawfully and negligently examined Poe and *wrongfully* and *forcibly* injected drugs into the person of Poe. The defendant administered drugs by coercion (Pet.

App. A3).[1] Additionally, please note that the Solicitor General did *not* factually challenge the "Statement of the Case" (Pet. 5-9).

Reference Gov't Opp. Memo 2.

The lower courts misconstrued and/or disregarded the *qualifying phrase* "where the injuries arise out of or are in the course of activity incident to service." The meaning of this phrase must first be definitively clarified, and, second, this clarification must be consistently applied to the factual circumstances of each case. Since "incident to service" is a question of fact, all of the facts must be judiciously considered. Thus, Poe is entitled to an opportunity to present evidence to show that his injuries were not incident to his service.

The Solicitor General admitted that a serviceman (Brooks) on furlough at the time of his injury was an *active duty* serviceman. Thus we see that being an active duty serviceman does not automatically bar recovery under the Federal Tort Claims Act. *Hypothetically,* if Poe had been arrested while on pass or furlough and if the same sequence of events had transpired, would the Solicitor General now argue that Poe's injuries were not incident to his service? What if Poe was arrested without probable cause on a military base while he was on a 3-day pass or furlough?

Poe could not possibly misread the court of appeals' *opinion* because there was no opinion. The Solicitor General wrote:

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1. Apparently, military authorities administer drugs forcibly and illegally to unconsenting servicemen without any qualms or hesitation, and with apparent impunity. The Supreme Court has done nothing to correct this shocking military abuse. The military has been guilty of heinous acts against its own personnel. See *Thornwell v. United States,* 471 F. Supp. 344 (D.C.D.C. 1979).

> "That opinion (sic) upheld the dismissal of petitioner's complaint because the alleged injuries were ' "incident to service" * * *'."

Fortunately, the Solicitor General raises the same issue as does Poe. *On what factual basis* was it determined that Poe's injuries were incident to his military service? (See Pet. 2, 5-8; Pet. App. A1-A6). Was it because Poe "was on active duty as an Air Force officer"? (See Gov't Opp. Memo 1; Pet. 13-14).

The Solicitor General correctly wrote:

> "Nothing in the court of appeals decision (sic) supports petitioner's claim that the affirmance was based merely on his active duty status."

Indeed, nothing in the court of appeals' *memorandum* (Pet. App. A7) supports a contrary proposition either, because said memorandum is simply a factually impoverished, unfounded, and unsupported "declaration" by a 3-judge panel of the Ninth Circuit. In the Record on Appeal (August 1, 1977 Transcript of Proceedings, pp. 8 and 10), we find the following relevant passages:

> p. 8: "THE COURT: Very well. I disagree with Mr. Poe and I think that the Feres case does say that, if you're a soldier on active duty, you can't recover;"
>
> p. 10: "THE COURT: * * *. When you join the military you can't sue the United States Government for anything they do to you when you're on active duty status."

Now re-read the exchange between Chief Judge Browning and Poe on Pet. 7.

The Solicitor General vaguely wrote that the court of appeals correctly applied settled law to the particular

facts. Precisely what *"settled law"* is the Solicitor General referring to? This case proves that the "law" is not quite settled. In fact, since there are no opinions below, how can we be sure what law or principles of law were applied?

Petitioner, like *Brooks,* was an active duty serviceman; however, unlike Poe, *Brooks* was not unlawfully arrested and confined in a psycho ward and forcibly injected with drugs without medical cause therefor. This Court does not or may not know why Poe was arrested and confined. The opinionless rulings of the lower courts have not helped at all in this matter.

Reference Gov's Opp. Memo 2-3.

According to the Solicitor General, *Feres* and its companion cases looked to the "status" of the injured serviceman. What status? What kind of status? Is a particular type of status dispositive of the "incident to service" test?

According to the Solicitor General, a breach of a regulation is immaterial under the rationale of *Feres.* Nonsense. First, the Solicitor General probably does not know what the *original* "rationale of *Feres*" was. Second, the *Feres* holding was rendered under circumstances where there was no breach of regulations. Hence, the Solicitor General's assertion is a *non sequitur.* Moreover, a serviceman perished by fire in his military quarters, which he accepted as his reasonable home. A second serviceman *consented* to an abdominal operation. A third serviceman *consented* to medical treatment by army surgeons which resulted in his death. These servicemen accepted quarters and consented to medical treatment. The barracks fire was not deliberately set. Army doctors did not force treatment on nonconsenting patients. These patients could have

selected civilian doctors. These servicemen had a reasonable freedom of choice which Poe did not have in relation to Poe's arrest and forced injections. A serviceman who drives a truck or flies an airplane knows that no machine is perfect. Likewise, no building is perfect. No surgeon is infallible. There was no breach of regulations nor violation of the Bill of Rights in the *Feres, Jefferson,* and *Griggs* cases. Third, let's assume there were regulations prohibiting faulty furnaces, prohibiting doctors from leaving towels in the stomachs of surgical patients, and prohibiting the forcible or surreptitious, nonconsensual administration of psychotropic drugs to servicemen. Let's further assume that commanders or doctors, *knowingly, maliciously,* and/or *in reckless disregard* of said regulations, assigned quarters to servicemen with faulty furnaces, left towels in patients' stomachs, and forcibly injected psychotropic drugs into patients without their consent. Now, the Solicitor General further asserts (Gov't Opp. Memo 3):

> "The result in *Feres* and its companion cases would have been no different * * *."

Poe doubts very much that the *Brooks* or *Feres* or *Brown* Court would go so far as to declare that the forcible injection of or the surreptitious administration of psychotropic or psychedelic drugs to unconsenting servicemen would be "incident to their service" under these circumstances.

The Solicitor General correctly stated that the question is whether the injuries alleged to have resulted were incident to service. However, in making that determination, a court of law must consider all the circumstances as they reasonably appeared at the time. Therefore, alleged breaches of regulations and constitutional transgressions

are relevant and material to such an inquiry and determination.

Reference Gov't Opp. Memo 3, n. 3.

Poe did *not* raise essentially the same claims in an earlier suit which was dismissed by the District Court of Hawaii (No. 76-0392). In that earlier suit, Poe sued the United States pursuant to Section 2 of P.L. 93-253, 88 Stat. 50 (see 28 U.S.C. 2680(h), as amended March 16, 1974). That was a tort claim for personal injury arising out of assault, false arrest and imprisonment, and the abuse of process, caused by the wrongful acts *of Air Force investigative or law enforcement officers.* The District Court, in dismissing that suit before an answer was filed and without receiving any evidence at all, stated during the February 4, 1977 hearing:

> "* * * and I'm not at all confident that I know what the law is right now, * * *. But, in the absence of some teaching from my superiors in the appellate divisions, it appears to me that this case is governed by Feres and Gamage, and I'll grant the motion to dismiss."

Subsequently, the District Court rendered judgment *without opinion*; the Court of Appeals affirmed *without opinion* (CA No. 77-1956). Attorney Brook Hart of Honolulu petitioned for certiorari (No. 78-589). This Court denied certiorari. Thus, as of today, there is no published opinion on the scope, meaning, and applicability of Section 2 of P.L. 93-253 although the purpose of said Congressional enactment was "to provide a remedy against the United States for the intentional torts of its investigative and law enforcement officers" and "to make the Government independently liable in damages for the same type of con-

duct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved)."[2]

Clearly then, Poe's *present* suit is not barred by the doctrine of res judicata.

Finally, the court of appeals did not in any real sense affirm the district court's decision "on the merits" because the so-called "merits judgment" of the district court was based on an *assumed* dispositive question of fact, without permitting Poe an opportunity to present evidence to rebut the *erroneous assumption* that being in an active duty status was automatically tantamount to "sustaining injuries incident to one's service." Contrary to the Solicitor General's claim, there was no "merits judgment" in the district court.

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2. Senate Report No. 93-588, 93rd Cong., 2d Sess., 1974, U.S. Code Cong. & Adm. News, pp. 2789-2792. Also, *Norton v. United States,* 581 F.2d 390, 395 (4 Cir. 1978).